No. 805

~~No. 3733~~ 14

IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

CHESTER A. BOWLES, Administrator, Office of Price Administration for and on behalf of the United States,
Plaintiff-Appellee,

vs.

JULIAN LENTIN doing business as J. LENTIN LUMBER COMPANY,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable John P. Barnes, Judge Presiding.

## Brief and Argument for Appellant.



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IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 8788

CHESTER A. BOWLES, Administrator, Office of Price Administration for and on behalf of the United States,
Plaintiff-Appellee,
vs.
JULIAN LENTIN doing business as J. LENTIN LUMBER COMPANY,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable John P. Barnes, Judge Presiding.

# Brief and Argument for Appellant.

## STATEMENT OF THE FACTS.

This is an appeal from a judgment and decree entered in the United States District Court for the Northern District of Illinois, Eastern Division, on January 12, 1945 which contained certain findings of fact and conclusions of law, the most important of which are that the defendant, Julian Lentin d/b/a J. Lentin Lumber Company on divers dates from October 20, 1943 to the date of the filing of the complaint on April 27, 1944 had purchased and sold lumber for prices in excess of the Maximum Prices established therefor under Maximum Price Regulation No. 94 as amended and under Maximum Price Regulation No. 458 as amended, which sales were not made to purchasers for

use or consumption other than in the course of trade or business; that the said sales and purchases by the defendant, Julian Lentin, at prices in excess of the maximum prices aforesaid were knowingly and wilfully made by him and were known by him to be in violation of the applicable regulations; that the testimony of the defendant, Julian Lentin, with respect to his purchases and sales and otherwise was false in material respects and that the amount by which the prices received by the defendant exceeded the maximum prices was $22,832.97.

Judgment was entered against the defendant, Julian Lentin, in the sum of $45,665.94 and costs and a permanent injunction was granted restraining and enjoining the defendant from selling, purchasing, and otherwise dealing in lumber in excess of the maximum prices established therefor by Maximum Price Regulation No. 94 as amended and Maximum Price Regulation No. 458 as amended, or any Maximum Price Regulation now or which may hereafter be issued pursuant to Emergency Price Control Act as amended, and from failing to keep records required by the Regulations, and from otherwise violating the terms and provisions of any of the Regulations as now or hereafter amended.

## THE PROCEEDINGS IN THE TRIAL COURT.

### The Pleadings.

Chester A. Bowles, Administrator, Office of Price Administration on behalf of the United States, filed a complaint on April 27, 1944 in two counts in which he charged this defendant and eighteen other defendants who operated retail yards with violations of Maximum Price Regulations 94 and 458 in that certain sales and purchases of Mexican Ponderosa Pine and oak flooring were made by and to them in violation of the maximum prices established by Maximum Price Regulation No. 94 covering Western Pine and Associated Species of Lumber, as amended, and Maximum Price Regulation No. 458 covering Oak, Pecan and Miscellaneous Hardwood Flooring, as amended. The complaint alleges that the defendants, other than the defendant, Julian Lentin, purchased from the defendant, Julian Lentin, carloads and parts of carloads of the two species of lumber above mentioned at prices in excess of the prices established by the aforesaid Maximum Price Regulations 94 and 458.

The first count of the complaint alleges that unless enjoined each defendant will continue to violate the regulations. (Tr. 2-7)

The second count of the complaint charges the defendant, Julian Lentin, with having sold certain lumber described as Western Pine and Associated Species, and Hardwood Flooring in violation of Maximum Price Regulation No. 94 as amended and Maximum Price Regulation No. 458 as amended and that prices received by the defendant in excess of the applicable maximum prices

amounted to $20,000.00 and that three times this amount equals $60,000.00. The plaintiff seeks preliminary and final injunctions against all defendants from violating the regulations and preliminary and final injunction against the defendant, Julian Lentin, requiring him to prepare and keep records, reports, statements and invoices available for the Office of Price Administration in accordance with the regulations, and seeks judgment on behalf of the United States against the defendant, Julian Lentin, in the sum of $60,000.00 and costs. (Tr. 7-9)

The defendant, Julian Lentin, by his Answer filed May 17, 1944, denied the material allegations of the complaint. (Tr. 10-12)

On May 2, 1944 the plaintiff filed his Motion for Preliminary Injunction in which was outlined specifically the purchase by the defendant, Julian Lentin, of approximately twenty-five carloads of Mexican Ponderosa Pine from the Pan-American Trading Company of Kansas City, Missouri, and the resale of these cars between November 8, 1943 and February 4, 1944 for prices aggregating $48,957.11 and that these sales resulted in over-charges in violation of Maximum Price Regulation No. 94 in the amount of $16,037.11; that on or about March 25, 1944 the defendant, Julian Lentin, purchased a carload of clear and select plain red and white oak flooring and between April 1st and April 4th, 1944, he sold the carload to eight lumber yards for a total of $4602.97 which resulted in an over-charge of $403.95 in violation of Maximum Price Regulation No. 458; that unless the defendant was enjoined, he would continue to charge prices in excess of the maximum price established by the two above numbered regulations.

The affidavits of Richard R. Johnson and John H. Regan are attached to the Motion for Preliminary Injunction and to Mr. Johnson's affidavit there is attached Exhibit A which

purports to show the ma
of $16,037.11 arising out
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(Tr. 14-30)

The defendant, Julia
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ner in which the total overcharges
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of oak flooring were estimated.

Lentin, filed his counter-affidavit
avits for Preliminary Injunction
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mills in Mexico into the United
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lling agent. Upon receiving this
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Chicago and discussed with Mr.
presentatives of the Office of Price
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ent facts were stated and he was
and Mr. Burt that importations
Pine were not restricted by any
Office of Price Administration, and
for the defendant to purchase the
board feet. As part of the said
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entitled MPR 94, Amendment 8,
943, from which regulation there
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tion and the Office of Price Ad-
ly established there were no price
Mexican Ponderosa Pine outside
d based on the said statement of

policy, the defendant was advised that he could purchase this pine at $63.00 per M board feet or whatever price was set by the producer and seller; that the defendant was furnished with an Import Number which permitted Pan-American Trading Company to import 800,000 feet of Mexican Ponderosa Pine into the United States; that the defendant realized a profit of not more than $3000.00, which included the cost of labor in handling and tallying the cars of lumber; that the defendant has made every effort at all times to comply with all regulations governing the purchase and sale of lumber; that regulations are numerous, voluminous, complicated, contradictory, and confusing; that this defendant has acted in good faith in all of his business transactions and that he exercised every precaution to determine in advance if the pine purchases and sales were authorized; and that the transactions complained of were due to erroneous advice given him by officials to whom the interpretation and enforcement of the regulations of the Office of Price Administration had been assigned; and that the amount stated in paragraph 2 of the Motion for Preliminary Injunction as the amount of overcharges made by this defendant is incorrect; that plaintiff was authorized to receive more for the lumber under Maximum Price Regulation No. 94 as amended than stated in the Motion for Preliminary Injunction and the affidavits supporting same; that the cars contained lumber designated as No. 3 Common and Better, which was of a much higher grade than is ordinarily sold under said designation; that No. 3 Common and Better according to the practices of the lumber trade means lumber containing a fractional proportion of "Better" and a predominant proportion of "No. 3 Common", whereas the lumber contained in the cars in question contained between 15% and 20% of No. 3 Common and the balance of No. 2 Common, No. 1 Common, D clear and C clear, and that many of the cars contained 18 to 20 foot lengths and that in some of the ship-

ments 18 and 20 foot lengths were from 25% to 40% of the entire contents of the respective cars; that the defendant was advised by the Office of Price Administration that as a private importer he was entitled to sell the Mexican Ponderosa Pine in carload lots at an increase of $6.50 per thousand board feet over his cost in addition to all other charges, including freight and delivery from Susanville, California to the destination of each lot of Mexican Ponderosa Pine, so that the computation made in the affidavit of John H. Regan, supporting the plaintiff's Motion for Preliminary Injunction is erroneous; that with respect to the purchase and sale of the oak flooring the defendant obtained permission from the War Production Board to purchase the flooring by authorized case number which provided for the sale of the lumber in truckload lots to retail lumber dealers who had certain types of orders and certain specified priority ratings; that he is a wholesale distributor with respect to the oak flooring; that he has wholesale distribution yard facilities; that although the lumber was sold directly from the cars, this was done to prevent a useless and unnecessary waste of man power and additional expense in unloading the said lumber for distribution and storage in any of his available storage spaces and then re-loading the lumber from said spaces to trucks for distribution to the purchasers. The lumber was needed for immediate emergency use and to do this would have also involved a loss of time. (Tr. 34 to 41)

As Exhibit 1 there is attached to the counter-affidavit of Julian Lentin, Amendment 8 to MPR 94 dated September 20, 1943 of which the pertinent paragraph appears as the fourth paragraph of the Press Release, a part of and preceding the amendment (Tr. 42) which states the following:

> "There are no price ceilings on purchases of Mexican pine lumber outside the United States, and both De-

fense Supplies Corporation and the private importer have been buying Mexican pine at prices close to the domestic pine ceilings for resale domestically to U. S. war agencies."

On May 27, 1944 the defendant filed an additional counter-affidavit by which he stated that as a result of the grading of three of the cars of lumber involved in the complaint the percentage of No. 3 Common pine to higher grades of pine in each of the cars was respectively 9 plus per cent of No. 3 Common, 90 plus per cent of better grades, 8 plus per cent of No. 3 Common and 91 plus per cent of better grades and 10 plus per cent of No. 3 Common and 89 plus per cent of better grades. Attached to the additional counter-affidavit of the defendant are three exhibits purporting to show that the prices charged for each of the three cars involved, based upon the actual lumber in each of the cars, was below the ceiling prices established by Maximum Price Regulation No. 94.

On May 31st the plaintiff filed the affidavits of Edwin L. Burt and Ben S. Huntley in opposition to the additional counter-affidavit of the defendant in which denial is made that the conversations between the defendant and them took place as alleged in defendant's counter-affidavit and which further state that Amendment No. 8 of MPR 94 applied only to the Defense Supplies Corporation, a government agency. (Tr. 44 to 54)

On September 25, 1944 an order was entered by which the Court reserved jurisdiction to enter a permanent injunction against all of the named defendants except Julian Lentin. The order was entered by the consent of the attorneys representing all of these defendant purchasers upon their representations that none of the violations alleged against the defendant purchasers was willful or intentional on the part of the defendant purchasers. The order reserves in the Court jurisdiction to enter a

permanent injunction upon notice in the event any violations of Maximum Price Regulation No. 94 and Maximum Price Regulation No. 458, as amended, occur after the date of the said order. (Tr. 60-61)

On December 5, 1944 the defendant, Julian Lentin, by leave of Court filed an amendment to his answer in which he stated that with respect to twelve of the other named defendants and sixteen of the cars of lumber, he acted as a factor or broker in that the said cars were delivered directly to these twelve named defendants by the Pan-American Trading Company, and that the said cars were ordered for the respective purchasers thereof and billed to the said purchasers at the importer's and seller's price therefor and that the defendant, Julian Lentin, received various sums of money from each of the purchasers of the lumber as and for his handling charges; that as to two cars of lumber specified in the complaint, the defendant was a wholesale distributor, the said cars were broken and divided among the various purchasers, and were sold at wholesale distributors' prices in conformity with all applicable price regulations. (Tr. 63-64)

On December 5, 1944 the defendant filed his Second Additional Counter-Affidavit to the Motion and Affidavits for Preliminary Injunction. The affidavit lists the sixteen cars and twelve purchasers named in the Amendment to the Answer, the amount billed by Pan-American Trading Company, the amount invoiced to the respective purchasers, and the amount of the handling charges received in each instance by this defendant. One of the said cars is alleged in the affidavit to have been sold to A. H. McGrew Lumber Company in which transaction this defendant received the sum of $119.15 as a broker or factor at $66.00 per thousand feet based at the time on notice that the price of the said car would be $66.00

per thousand feet. Two cars were sold in small lots at wholesale distributor prices; that none of the transactions which are described in the affidavit as factoring or brokering transactions was a sale or purchase of lumber so as to be a basis for a charge of a violation of MPR 94 and MPR 458. (Tr. 67, 68)

**The Evidence.**

The issues having thus been made up by the parties, the case proceeded to trial and the plaintiff offered evidence of the transactions between the defendant and the Pan-American Trading Company, and between him and the various retail yard purchasers of lumber. Evidence was further introduced showing the prices for the lumber involved permitted under MPR 458 for oak flooring and MPR 94 for No. 3 Common and Better Mexican Ponderosa Pine of various widths and lengths, the amount of freight permitted to be charged for this lumber was offered in evidence, and under the Regulation certain additional charges were added to the prices thus arrived at as a result of which plaintiff undertook to prove that there had been an overcharge of $22,-832.97 on the sales of Mexican Ponderosa Pine and oak flooring. This sum was calculated by adding to overcharges stated in plaintiff's Exhibit 51 of $16,126.36 on the sale of the Mexican Pine, the sum of $244.13 on the sale of the oak flooring, and by applying, what plaintiff's attorney called the same proportion, to the pine overcharges on the 19 cars as fixed in Exhibit 51 to 9 additional cars and thus adding the sum of $6462.48 as overcharges for the 9 cars. (Tr. 220)

The plaintiff introduced the evidence of one Charles L. Baxter to the effect that he had been offered this lumber by Pan American Trading Company at $55.00 per M board feet, had consulted with OPA and as a result of letters

received from OPA had refused to purchase the lumber. This testimony and the letters were admitted in evidence over the objection of the defendant. (Tr. 135, 138)

The defendant, Lentin, offered to prove by the various retail yard purchasers, all of whom were among the other defendants in the case, the nature and grades of the contents of the cars purchased by each of them. Objections to this testimony were sustained by the Court. (Tr. 150 to 173 and 195 to 197)

Offers of proof that the cars, when examined by the purchasers, all of whom were qualified to grade Mexican Pine, contained a substantial proportion of lumber better than No. 3 Common and that the grades actually contained in the cars were sold within the ceiling prices established by MPR 94 and that the sale of this lumber did not tend to add to the burden or possibility of or cause any inflation were likewise rejected on objection. (Tr. 155, 162, 173, 197)

Offers of proof that the defendant, Lentin, had yard facilities for unloading and storing lumber were rejected by the Court on objection. (Tr. 157, 173, 215)

The defendant, Lentin, offered to testify to his conversation with Mr. Ben L. Huntley, Senior Business Analyst, employed in the Chicago District Office of OPA concerning the prospective purchase of this lumber at $63.00 per M feet plus freight from the Mexican Mills, which the Court refused to allow him to do (Tr. 179, 181) but subsequently in the trial, the attorney for the plaintiff withdrew his objection to this testimony and the Court allowed it to be given (Tr. 199, 200) and thereupon the defendant testified to his conversation with Mr. Huntley in which Mr. Huntley advised him that lumber imported from Mexico was not subject to price ceilings and it could be purchased at the importer's price and that he received Amendment 8 to MPR 94 and in the Press Re-

lease, a part of this Amendment, his attention was called to a statement that confirmed this advice given him by Mr. Huntley. The defendant testified that although he stated in his affidavit that he had spoken to Mr. Burt, he had not in fact spoken to Mr. Burt but when he spoke to Mr. Huntley, Mr. Huntley consulted with other persons in the Office of Price Administration and it was his impression that Mr. Burt was one of these persons with whom he consulted. (Tr. 200-203)

The total number of cars of Mexican Ponderosa Pine handled by this defendant was 28, nine cars more than were included in the complaint, and in the affidavits in support of the Motion for Temporary Injunction. The nine additional cars were similar to the other cars handled and were handled in about the same way. (Tr. 194)

Of these 28 cars, the evidence shows that 2 were sold to numerous purchasers in small lots, and 17 were sold in carload lots. There is no evidence of the manner in which the balance of the cars were sold. In addition, the defendant handled one car of oak flooring which was also sold to numerous purchasers in small lots.

The defendant claimed that the prices charged by him for the two cars of pine sold in small lots and the car of oak flooring were within the ceilings established by MPR 94 and MPR 458 for wholesale distribution yard sales.

The plaintiff was granted leave to amend his complaint by adding to the amount of treble damages claimed, an additional $30,000, making the total claimed $90,000.00. (Tr. 147)

The defendant proved that he was charged $63.00 per M board feet for the pine lumber and that he charged the retail yard purchasers $63.00 per M board feet for the pine lumber in carload lots, plus $3.00 and on three carloads $4.00 per M board feet for handling. In the

case of one car the price charged was $66.00 per thousand board feet because he had been advised that that was to be the price of this car. His gross profit on the original 19 cars was less than $2400.00 (Defendant's Exhibit 2, Tr. 189) and less than $3000.00 on the entire 28 cars of pine lumber.

After the close of all the testimony, the Court accepted the plaintiff's statement that he proved overcharges on the cars of Mexican pine and oak flooring in the sum of $22,832.97. The Court accepted the plaintiff's suggestion that by applying the same proportion to the additional nine cars that had been applied to the original nineteen cars, the amount of overcharges were thereby fixed at $6462.48 for the additional nine cars. (Tr. 220) No proof was offered by the plaintiff of the contents, the actual grades, the amount paid, and the amount per carload or per smaller quantity for which any of the lumber in these nine cars was sold. On the basis of the testimony and the suggestion of the plaintiff, the Court found that a total of $22,832.97 was the amount of overcharges, and on the basis of this figure, entered a judgment for $45,665.94 and costs, which is double this amount, and also entered a permanent injunction against this defendant. (Tr. 255)

Motion for a new trial was heard and overruled. (Tr. 258)

**The Contested Issues.**

The Contested Issues involved in this appeal are:

1. The Trial Court, by his numerous remarks made during the course of the trial, intimated prejudice and bias inconsistent with a fair trial, and made it impossible for the defendant to convince the Court of his good faith and of his having taken practical precautions to avoid the violation of the regulations.

2. The Court erroneously entered a judgment for damages against this defendant, since the plaintiff was estopped from seeking damages against this defendant by the conduct of an official of the Office of Price Administration, and by the language of an official document of the Office of Price Administration.

3. The Court erroneously refused to permit the defendant to show that he was acting only as a broker or factor as to most of the cars purchased in behalf of the other defendants.

4. The Court erroneously sustained objections to testimony offered to establish the defendant's good faith.

5. The Court erroneously allowed the plaintiff a judgment based upon $6462.48 in alleged overcharges without any proof in the record to establish such overcharges.

6. The Court erroneously entered a judgment for an amount in excess of the actual single damages proved.

7. The Court erroneously failed to give the defendant credit for an item of $2.00 per M board feet on each of the cars by reason of the cars containing 18 and 20 foot lengths, as provided for in MPR 94.

8. The Court erreoneously admitted and considered the testimony of Charles L. Baxter with reference to his experience with the Office of Price Administration in connection with the proposed purchase of lumber from the Pan American Trading Company.

9. The Court erroneously refused to allow the defendant to prove that he had yard facilities in which to unload and store, and from which to sell lumber in less than carload lots at prices fixed by MPR 94 and MPR 458 for distribution yard sales in less than carload lots.

10. The Court erroneously refused to permit defendant to prove the actual contents of the cars of Mexican

Pine and the maximum prices at which these cars, based upon actual contents, could be sold under the applicable regulations.

11. The Court erroneously entered an injunction against this defendant without proof of the likelihood of violations in the future.

## PROPOSITIONS OF LAW RELIED ON.

### I.

**The comments of the Trial Court during the trial, indicate bias and prejudice against the defendant and are inconsistent with the calm and deliberate consideration of evidence and judicial impartiality consonant with principles of justice and due process of law.**

*Mason* v. *United States,* 63 Fed. (2d) 791.
*National Labor Relations Board* v. *Air Associates,* 121 Fed. (2d) 588.

### II.

**Plaintiff was estopped from recovering any damages against the defendant by the facts and circumstances of this case.**

**Walker v. United States, 139 Fed. 409.**
**The Siren, 7 Wall. 159.**
**People v. Bradford, 372 Ill. 63.**
Amendment 8 to Maximum Price Regulation 94.

III.

Evidence excluded by the Court tending to establish that the defendant's relation to retail purchasers of full carload lots of lumber was that of a factor or broker, prevented the defendant from establishing the basis for a finding that as a factor or broker and not as a seller, the defendant was not subject to the damage provisions of Section 205(e) of the Emergency Price Control Act of 1942 as amended.

(See Argument.)

IV.

The judgment for more than single damages was erroneous, in view of the failure and refusal of the Trial Court to properly consider defendant's evidence and offers of proof tending to establish lack of wilfulness to violate the regulations and the taking of practical precautions by the defendant against the occurrence of the violation.

(See Argument.)

V.

The Trial Court erroneously considered improper and wholly inadequate testimony as to overcharges in the sale of nine cars of lumber and improperly entered judgment for $12,924.96 as a part of the total judgment of $45,664.94 without proof to support the first above stated damages.

(See Argument.)

VI.

**The evidence and exhibits of Charles L. Baxter received over the objection of the defendant were improperly received and were prejudicial.**

Corpus Juris Secundum, Vol. 32, Sec. 576, page 432.

*General Motors Corp.* v. *Blackmore*, 53 Fed. (2d) 725.

Wigmore on Evidence, 3rd Ed. Vol. 2, Sec. 377, page 310.

VII.

**The Court's refusal to allow defendant and his witnesses to testify to the defendant's distribution yard facilities and to the defendant's knowledge of the grades and qualities of the lumber was improper.**

(See Argument.)

VIII.

**Defendant was improperly denied credit for specified 16, 18, and 20 foot lengths, 4 and 6 inch widths, as provided in Maximum Price Regulation 94.**

(See Argument.)

IX.

**The permanent injunction entered against this defendant was improperly entered in the absence of proof of the likelihood that the offense will recur.**

*The Hecht Company* v. *Bowles, etc.*, 321 U. S. 321.

*Shore* v. *United States*, 282 Fed. 857.

*Walling* v. *T. Buettner & Co.*, 133 Fed. (2d) 306.

## ARGUMENT.

### I.

**The comments of the Trial Court during the trial, indicate bias and prejudice against the defendant and are inconsistent with the calm and deliberate consideration of evidence and judicial impartiality consonant with principles of justice and due process of law.**

The record shows that throughout the trial, the Trial Court made statements of his opinion of the defendant as a violator of OPA regulations which indicated a prejudiced and biased attitude toward him and which we contend prevented the defendant from receiving a fair trial.

We first call attention generally to the Court's impatience with any attempt made by the defendant to offer evidence on the question of good faith, and to the exclusion of all such offers of proof. The defendant called as his witnesses a number of owners of the retail yards to whom the lumber was sold for the purpose of establishing the actual quality of the lumber when examined and graded by these purchasers (Tr. 153-155, 162, 169, 173, 177-191, 197) and offered for sale to the consumers. (These purchasers were among the defendants in this case who were not penalized for their part in these transactions by the decree of September 25, 1944. No injunction as prayed in the complaint was entered against them. The Court's decree allowed them to say they did not act wilfully and reserved jurisdiction to enjoin them, on notice, if they should violate the regulations in the future.

(Tr. 59-61) All suc
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a profit of $2400.00
guilty of trying to
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a defendant in on
OPA regulations th
(Tr. 230)

testimony was excluded and the proof that this testimony would ual grades contained in the cars ublic was enabled to purchase this in the price ceilings, was likewise . (Tr. 154) We contend that the mony contained in these offers of that the regulations did not allow actual grades when the lumber was ion grade, was erroneous. The evi- roof were pertinent to the question because if the defendant, who was, told that imported lumber was not ngs, knew, after the first car was nber was of such a quality that the it at a profit within price ceilings s, lengths, and widths, proof of this evidence to show that he was acting

re true it would have been proper fulness. The Court considered this cularly serious violator of the law. stated opinion that this defendant deliberately dodged the regulations by marking his invoices to show invoiced to retail purchasers at a an additional sum for handling the covering up his guilt by attempting a broker (Tr. 190); (3) who had t of $16,000.00 for the sake of making (Tr. 189); (4) who was particularly vade the regulations because he con- f OPA (Tr. 179); and (5) who was of the worst cases of violation of had ever been presented before him.

We contend that none of these remarks and the characterizations of the defendant contained in them were justified by any evidence in the case. The Court refused to allow the defendant to show what the public paid for the lumber and whether or not these prices were, as the defendant contended, within the retail price ceilings (Tr. 154), and there is nothing in the record upon which the Court could have based his characterization that the defendant was a black market operator. (Tr. 229) The language employed by the Court seems to indicate that the Court was generally prejudiced against defendants in OPA cases.

There is likewise no justification for the Court's characterization of this defendant because invoices made at the time of the various sales to retail yards revealed the price to the retail yard and an additional item for handling charges, that the defendant was thereby seeking to cover up illegal transactions by establishing his relationship with the retail yards as a broker or factor for them and thereby seeking to avoid liability for violation of the regulations. (Tr. 190) The invoices, which are in evidence as Plaintiff's Exhibits, reflect exactly how the lumber was handled between the defendant, the Pan American Trading Company, the shipper, and the retail yards, and there is no evidence to support the Court's statement that the defendant designed them to "cover up."

The statement of the Court that this defendant had "taken every dodge that has been used in every case before me to escape liability" (Tr. 231) is further evidence of the fact that the defendant did not receive a fair trial. We believe that it is error for a Court to possess an attitude that a defendant who presents whatever defenses he may have is thereby resorting to "dodges" and that because of this attitude this defendant could not and did not receive a fair trial.

The Court believed that the defendant caused the public to be mulcted out of a large sum of money (Tr. 189) and for this characterization as for all of the others, there is not the slightest support in the evidence. The attempt made to show that the public paid ceiling prices or under for this lumber was denied the defendant and there is nothing else in the record to justify this biased and prejudiced statement by the Trial Court.

Finally, we find no reason for the Court's belief that this was one of the worst cases of OPA violation that had ever been presented to him. This attitude evidences a refusal of the Court to consider any evidence that may have been favorable to the defendant. It is inconsistent with a fair trial.

We urge, that if in a trial by a jury any of the above attitudes could be shown to have been held by members of that jury, a verdict against the defendant by that jury would be reversed on the ground of prejudice. We can see no distinction between a prejudiced jury and a prejudiced Trial Court as it affects the right of a defendant to a fair and impartial trial.

The case of *Mason* v. *United States*, 63 Fed. (2d) 791 resulted in a reversal of the Trial Court's judgment because of prejudicial remarks made by the Trial Court during the course of the trial in the presence of the jury. We cite this case, not because of any similarity between it and the case at bar, but simply to point it out as an instance in which the remarks of a Court during the trial may so prejudice a defendant as to require a reversal on that ground.

In the case of *National Labor Relations Board* v. *Air Associates*, 121 Fed. (2d) 588, 590, the Court states:

> "It is conceivable that even in a trial before a judge without a jury the conduct of the judge might

be so unfair as to give rise to sufficient inference of a prejudice in his findings to warrant a reversal of a judgment entered by him."

We have been unable to find cases which are similar to the case at bar on this point. We recognize that the facts of each case must determine whether the alleged prejudicial remarks were of such a nature as to prevent the defendant from receiving a fair trial, and it is our contention that in this case the remarks and attitude of the Trial Judge, unwarranted by any evidence in the record, and in themselves of a highly prejudicial nature, prevented the defendant from receiving a calm and deliberate consideration of the evidence and requires a reversal of the judgment.

## II.

**Plaintiff was estopped from recovering any damages against the defendant by the facts and circumstances of this case.**

The defendant testified that the Office of Price Administration, through an official placed in a position and given authority to speak for the Administrator, with whom the defendant consulted, advised the defendant that it was permissible for him to engage in a transaction involving the purchase of imported lumber without violating OPA regulations, since lumber imported from Mexico, according to the official's advice, was not subject to American price ceilings. Based upon this information, the defendant ordered the carloads of Mexican Ponderosa Pine involved in this proceeding. There are no facts, either in the evidence or that may be implied from any evidence from which it may be said that the defendant had any intention to profit, or actually profited, in any sum that represented the difference between the prices paid for this

lumber and the ceiling prices the plaintiff now contends apply to the sale of this lumber.

On the basis of the plaintiff's calculation of profits, this would mean that the defendant would have profited on this transaction to the extent of approximately $22,000. The undisputed fact is that he made a profit of approximately $100.00 on each carload of lumber or about $3,000.00 on the entire transaction, and this amount included certain handling charges and was not his net profit.

Nevertheless the Office of Price Administration instituted an action for triple damages against this defendant based upon an alleged overcharge of $30,000.00. No consideration is given to the fact that the defendant from the very beginning could, under no circumstances, have intended to profit in excess of $3,000.00 and that the actual result of the transaction was a profit to the defendant of less than $3,000.00.

The attorney for OPA made a statement to the Court that this defendant was barely distinguishable from a criminal, and the Court stated that this was one of the worst cases ever presented before it. The defendant's plea that he inquired if the purchase could be made at the quoted price and was told that it was permissible without violating the regulations and in support of the advice he received from OPA, a printed copy of Amendment 8 to MPR 94 which appeared to support the advice that imported lumber was not subject to price ceilings, was met by the brusque statement of the Court that the defendant could not rely on what he was told by OPA representatives since OPA representatives could not bind the United States (Tr. 179) and that OPA press releases were of no force whatsoever (Tr. 127), and the Court suggested that the defendant was the worst kind of violator because he inquired of OPA before he bought the lumber (Tr. 179), which the Court implied was merely proof of

his cunning and established that he was making inquiries to cover his bad faith.

It did not seem to occur to OPA or to the Court that such treatment of citizens makes no moral or social sense. In the context of democratic forms and methods, it is the worst and most cynical kind of oppression. There is and must be no reason why a citizen cannot rely upon the advice of a representative of a government agency given in answer to specific questions, and why this advice sought and received in good faith is not a complete defense to a suit for triple or any damages. The Office of Price Administration, under these circumstances, should be estopped from claiming damages on behalf of anyone, including the United States, when by its advice it induces a citizen to act in a certain manner, and the acts of the citizen do not reflect that he profited by following the advice to the extent of substantially the excess amount involved, and the acts did not involve a result contrary to the purposes of the Price Control Act and the regulations issued thereunder.

We contend this, with due recognition of the fact that it has been held that the giving of judgment for at least single damages, where violations of price regulations are shown, is not subject to the discretion of the Court. We argue that the language of Section 205 (e) of the Emergency Price Control Act of 1942 does not abrogate the defense of estoppel when it exists, and that in this case both the evidence of conversations, the language of the Press Release of Amendment 8 of MPR 94, and the circumstances of the transactions for identical prices plus a nominal charge of approximately $100.00 per car for handling the lumber, support the defense of estoppel.

The result in this case is otherwise grotesque and unconscionable.

It is apparent in this case, although the Court afterwards, upon the voluntary withdrawal of plaintiff's objection to evidence offered, heard evidence of conversations with Mr. Huntley, Senior Business Analyst of the Office of Price Administration, (which conversations Mr. Huntley did not remember) that the conclusion of the Court with respect to the effect of these conversation upon the defendant's conduct was not based upon the resolution of the seeming conflict in the evidence as to the conversations, in favor of the plaintiff, but on the ground that this evidence did not matter—"It was not binding on the United States."

We contend that if the Court should omit from its consideration conversations conveniently forgotten by Mr. Huntley, the language of the Press Release, part of Amendment 8 of MPR 94, and its calculable effect upon the citizen who reads it, not with the sharpened eye of the lawyer, but with the simple understanding of the layman, creates an estoppel which is a complete defense to the claim for damages in this case.

We further contend that it is against the current of American jurisprudence to announce and enforce a principle of damages to which there is no defense. Objections in this regard have been overruled by the courts in recent cases, without considering the inherent harm that lies in travelling along this dangerous road. It is a rigid principle. Safety and justice have always demanded and still require flexibility in the consideration of recognized defenses. To say that damages must be allowed by a Court if a violation of regulations is shown by proof of prices in excess of ceilings, is to say that there can be no circumstances which would, at least, prevent the plaintiff from categorically asserting that, there being a violation, there must be at least single damages. If this were true, there could be no defense of

estoppel or entrapment, to state but two possible defenses that have always been recognized as indispensable to the safeguarding of the rights of citizens.

We urge a modification of the type of legal thinking that will discard these ancient defenses. We urge the Court that in this case, the circumstances constitute a complete defense to the action. The Office of Price Administration, by the action of its official, made the violation possible. The circumstances show that but for the plaintiff's action, the defendant would not have committed the violation. The evidence shows beyond dispute that the defendant did not profit by reason of the violation to an extent which indicates that profit was the motive for the violation.

We are aware that the doctrine of *estoppel in pais* against the United States or an administrative agency of the United States has been reluctantly invoked by the Courts and in most cases denied. Yet there runs through all these cases the reservation either expressed or implied that in a proper case it may be enforced against the sovereign.

The case of *Walker* v. *United States,* 139 Fed. 409 affirmed by the Circuit Court of Appeals in 148 Fed. 1022 involved a question of whether by a course of conduct in paying certain claims of a United States Marshal, the United States was estopped from seeking to recover payments so made, which were conceded to have been illegally made, by way of a counterclaim. The following is the language of the decision:

> "After much deliberation the Court has reached the conclusion, whatever may be the general rule, that under the facts of this case the United States stands as to its counter-claim upon no better footing than would a private citizen, though doubtless it may recover money paid under mistake of law by its officers.

> It is conceded that the money the Government now seeks to recover by its counter-claim was illegally paid out, that the United States cannot be defeated or barred of its rights by the mere laches of its agents; that it cannot be estopped by the unauthorized acts of its accounting officers; that it is not subject to the Statute of Limitations, and that the unauthorized acts of its agents never bind the sovereign. It is, however, equally true when the sovereign becomes an actor in a court of justice, especially in an action which proceeds on equitable principles, that his rights must be determined upon those fixed principles of justice which govern between man and man in like situation, and that the sovereign will be bound as an individual would be by his own acts or by (what is the same thing) acts of his agents lawfully done within the purview of the authority he commits to them."

In the case of *The Siren*, 7 Wall. 159, 19 L. Ed. 129, the Supreme Court of the United States held as follows:

> "The underlying principle of all the decisions is that when the sovereign comes into court to assert a pecuniary demand against the citizen the court has authority and is under duty to withhold relief to the sovereign except upon terms which do justice to the citizen or subject as determined by the jurisprudence of the forum, in like subject matter between man and man. Acts or omissions of its officers, if they be authorized to bind the United States or to shape its course of conduct as to a particular transaction, may, in a proper case, work an estoppel against the Government."

The Supreme Court of Illinois, in the case of *People* v. *Bradford*, 372 Ill. 63, 74, held as follows:

> "The rule adopted in Federal Courts as applied to the Government of the United States or the States concerning the matter of estoppel and the position which the Government occupies before the courts in a suit brought by it, have been well discussed and considered in *Walker* v. *United States*, 139 Fed. 409,

*Linsay* v. *Hawes, supra,* (2 Black (U.S.) 554), *Sinking Fund* cases in 99 U. S. 719, 25 L. Ed. 496, and *United States* v. *Bank of Metropolis,* 15 Pet. 392, 10 L. Ed. 774, wherein the rule is adopted that the Government, when proceeding in court against the citizen stands upon no better footing than would a private citizen, even though the suit relates to the collection of its revenues."

There are a number of recent cases in which the various Circuit Courts of Appeals have held that the United States is not bound by advice or information given by officials of the various administrative bodies. The reading of these cases does not indicate that the rule announced above has been changed. For the rule provides that the doctrine of estoppel is applicable to the United States by reason of any acts of officials of the United States acting in the performance of their duty under circumstances which require the application of the doctrine in order to deal justly with the citizen.

The statement of the rule does not deprive the United States of all the privileges due the sovereign in proper cases so that the sovereign is not bound by statutes of limitation, or by unauthorized acts of officials, or precluded from recovering money paid under mistake of law by its officers. Granting these privileges to the sovereign does not, however, deprive the citizen of the right in proper cases to invoke the doctrine of estoppel where justice demands that he have the protection of this doctrine.

In the case of *Walker* v. *United States,* 139 Fed. 409, the Marshall was held both by the District Court and the Circuit Court of Appeals to be entitled to invoke the doctrine of estoppel against the United States when the United States sought to recover back moneys paid to the Marshall which he had distributed, although it was conceded that this money had been illegally paid.

The defendant testified that after his conversation with Mr. Huntley, in which Mr. Huntley advised him that imported lumber was not subject to American price ceilings and could be purchased without regard to regulations, he received Amendment 8 to MPR 94 (a copy of which appears in Tr. 42-43). The fourth paragraph of the Press Release which is a part of the Amendment reads as follows:

> "There are no price ceilings on purchases of Mexican pine lumber outside the United States, and both Defense Supplies Corporation and the private importer have been buying Mexican pine at prices close to the domestic pine ceilings for resale domestically to U. S. war agencies." (Tr. 42).

The matter of the language of the Press Release was dismissed by the attorney for OPA by stating that the Amendment applied only to Defense Supplies Corporation, which is a government agency, and not to any private purchasers, and by the Court's characterization of the Press Release as being of no binding effect.

We are nevertheless concerned with a printed document prepared and issued by the Office of Price Administration, a government agency, and with the effect upon a business man to whom this document is given. We are concerned with the effect upon this business man of the above quoted language. Language which does not confine itself to the Defense Supplies Corporation but which also points out that private importers have been buying Mexican pine at prices close to the domestic price ceilings on which Mexican pine lumber, outside the United States, there are no price ceilings. We are concerned with a regulation which is so complicated that a number of controversies arose between the lawyers and the Court in the trial of this case as to the meaning of many of the sections of the regulation. The purchase of the lumber in contro-

versy was made after the defendant had read what appears to state that for all purposes and for any persons, there are no price ceilings on purchases of Mexican pine lumber outside of the United States. The defendant was contemplating handling lumber from Mexican mills to be shipped from these mills to the United States. It was undoubtedly the kind of a transaction that OPA itself stated on September 20, 1943 before the purchases were made, was not subject to price ceilings.

The language of this paragraph in the Press Release could have, and undoubtedly did, mislead Mr. Huntley himself, who in turn, as the defendant testified, advised the defendant, based upon this unqualified statement in a document issued by the agency with which Mr. Huntley was connected. We believe it to be beside the point that this language was a part of a Press Release and not incorporated in the Amendment itself since this is undoubtedly a distinction we cannot expect the private citizen to draw. We likewise believe it to be beside the point that the Amendment itself applies only to the Defense Supplies Corporation, since the language that the defendant depended upon includes the private importer as well. We believe it to be an important point that the defendant was induced to handle this lumber at $63.00 per thousand board feet because Mr. Huntley told him he could do so, and because the OPA supported Mr. Huntley in his opinion by the language appearing in Amendment 8 to MPR 94.

The defendant ordered this lumber because the demand for this lumber was very great and the supply in the United States was very limited. (Tr. 101) The lumber, the record shows, was so satisfactory that a number of the retail yards reordered additional cars. In no instance of carload lot sales except one, was the lumber invoiced, nor did the defendant receive from his retail pur-

chasers more than the price he paid to the Pan American Trading Company. The one instance was invoiced at $66.00 per M.B.M. when the defendant was advised the price of that car would be $66.00 per M.B.M. He added what was less than an ordinary and nominal profit to each of the cars, which for all 28 cars did not exceed $3000.00. The only explanation for entering into this transaction is that the transaction was permissible because OPA and Mr. Huntley of OPA stated that importations of Mexican pine were not subject to price ceilings and because the language of the Press Release which was issued as a part of Amendment 8 of MPR 94 induced the defendant to believe that a markup of $6.50 per MBM was permissible and defendant's handling charges of $3.00 and in three instances of $4.00 per MBM were well within the $6.50 markup. The language referred to reads as follows:

> "Permission to sell Mexican pine at prices $6.50 per thousand board feet above Western pine ceiling is granted in Amendment No. 8 to Maximum Price Regulation No. 94 and becomes effective September 25, 1943." (Tr. 42)

This is a proper case for the application of the doctrine of estoppel for the reasons, that the damages provisions of the Emergency Price Control Act of 1942 as amended are still so inflexible that injustice may arise, and in this case has arisen, under them. A statute which gives a Court no power to assess less than single damages or the minimum amount stated in the statute for violations committed in good faith and with practical precautions to avoid violations, merely by showing an overcharge admits of innumerable circumstances that may make enforcement oppressive. The circumstances demand that a citizen who can show violations of the regulations induced by the advice of a representative of an administrative agency and who can further show that the

violation did not result in a large profit directly related to the overcharges and that there never was any intention of profiting to the extent of the overcharges, and that the violation did not result in a condition sought to be prevented by the Price Control Act, should not be oppressed by being assessed approximately $46,000.00 for a transaction in which his profit was less than $3.000.

## III.

**Evidence excluded by the Court tending to establish that the defendant's relation to retail purchasers of full carload lots of lumber was that of a factor or broker, prevented the defendant from establishing the basis for a finding that as a factor or broker and not as a seller, the defendant was not subject to the damage provisions of Section 205(e) of the Emergency Price Control Act of 1942 as amended.**

Section 205 (e) of the Emergency Price Control Act of 1942 as amended provides for the recovery of damages for violation of the Act and the regulations issued pursuant to the Act. Its language is as follows:

> "(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount

not less than $25 nor more than $50. as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered."

Only sellers are made the subject of its provisions for damages. Buyers, although mentioned in this section of the Act, are not named as persons who are subject to actions for damages under this section of the Act. No mention is made of any other handlers of goods and such handlers of goods, including factors or brokers, are by

reason of their omission as parties who may be sued for damages, not liable under this section.

On December 5, 1944 the defendant, Lentin, by leave of court, filed an amendment to his Answer, the purpose of which was to present as an additional defense that the defendant, Lentin, as to 16 of the original 19 cars included in plaintiff's Exhibit 51, was a factor or broker and not a seller and not liable under Section 205 (e) of the Emergency Price Control Act of 1942 as amended.

In the trial of this case the Trial Court not only refused to consider evidence offered by the defendant, Lentin, tending to establish this defense, but as pointed out elsewhere in this brief, stated that the defendant was trying to "cover up" the transactions by calling himself a broker. The Court held that the defendant, Lentin, bought the goods; he would therefore not be allowed to testify or present the testimony of other witnesses to establish any arrangement that was made with the other defendants that might show that they ordered the defendant, Lentin, to buy the carloads of lumber for them on their specific orders and the defendant, Lentin, did not act as the seller of these carloads of lumber. (Tr. 190)

The witness, Hinojosa, proprietor of Pan American Trading Company, the shipper of all the pine involved, was not permitted to testify that the defendant ordered the cars out car by car at the request of particular purchasers on the order of each particular purchaser (Tr. 211), nor were the defendant and other witnesses permitted to state that each purchaser knew the prices, had seen other cars and knew how the lumber would grade, knew he could resell to the consumer within permitted ceilings at a profit and all the other conditions surrounding the transaction.

Plaintiff's Exhibit 6 is an invoice of Pan-American Trading Company to Elmont Lumber Company for 29806-2/3 feet of Mexican Ponderosa Pine at $63.00 per

MBM, $1877.82. Plaintiff's Exhibit 6-A is an invoice from defendant, Lentin, to Elmont Lumber Company for the same lumber, at the same rate, and for the same total price. Plaintiff's Exhibit 6-B is an invoice from the defendant, Lentin, to Elmont Lumber Company for one lot of pine lumber, 29806-2/3 feet at $3.00 per MBM, $89.42.

The car of lumber involved in these exhibits was shipped to Chicago for the Elmont Lumber Company. The price charged Elmont Lumber Company is Pan-American Trading Company's price of $63.00 per MBM and the defendant, Lentin, charged Elmont Lumber Company $3.00 per MBM for handling the lumber.

Plaintiff's Exhibit 14-B describes this item charged to Lippman Lumber Company as "unloading, tally and handling charges". Exhibits 19-A and 21-A also describe these charges as "handling" and "handling charges". The foregoing Exhibits show the manner in which all carload sales were handled by the defendant Lentin. In all sales in carload lots the exhibits show an invoice for the lumber at the price charged by Pan-American Trading Company, and an invoice for $3.00 or in three instances for $4.00, per MBM by the defendant, Lentin, for handling.

The invoices made at the time of the transactions do not reflect what is the common purchase and sale, in which case there need be only one invoice between the defendant, Lentin, and his retail yard customer in which Lentin's price would be stated to include his profit. The making of the invoice to the retail yard purchaser at the importer's price and another invoice for handling charges is beyond doubt a departure from the common sales transaction. It may be the basis for a factoring transaction and if the defendant had been permitted by the Trial Court to introduce evidence excluded tending to establish this relationship, the defendant would not have been improperly precluded from having the advantage

of evidence in the record from which it could be established that as to all, or a major portion of cars sold as full carloads of lumber, the defendant was not the seller, but was a factor, and as such was not liable for damages under Section 205 (e) of the Emergency Price Control Act of 1942 as amended.

## IV.

**The judgment for more than single damages was erroneous, in view of the failure and refusal of the Trial Court to properly consider defendant's evidence and offers of proof tending to establish lack of wilfulness to violate the regulations and the taking of practical precautions by the defendant against the occurrence of the violation.**

Section 205 (e) of the Emergency Price Control Act of 1942 was amended on June 30, 1944, and by its amendment it became permissible for the first time for the Trial Court to consider elements of the defendant's lack of wilfulness to violate applicable price regulations, and whether or not the defendant failed to take practical precautions to avoid violations for the purpose of determining if more than single damages should be assessed against defendant.

The defendant offered to testify to a conversation with Mr. Ben S. Huntley, the Senior Business Specialist, employed in the Office of Price Administration in Chicago. When this testimony was first offered, the Court refused to permit the defendant to testify and stated: "I don't care—objection sustained. You know that the United States cannot be bound by talks with the Office of Price Administration, with District Attorneys, or with anybody else". (Tr. 179)

This observation by the Court was followed by this statement: "The worst violator is the man who goes

around and has these conversations. He is trying to figure some loop-hole". (Tr. 179)

On page 178 of the Transcript the Trial Judge stated that many defendants had tried to show that products which they were charged with selling above established prices for certain grades, were in fact of higher grades, and could be sold for higher prices without violating the regulations; that these defendants had not gotten away with it.

Later in the trial (Tr. 199-200) the attorney for the plaintiff suggested to the Court that it might be error to persist in refusing to allow the defendant to testify to conversations with OPA officials, which the defendant contended misled him, in view of the amendment to Section 205 (e) of the Emergency Price Control Act of 1942. This testimony, it was suggested, might establish lack of wilfulness, and the taking of practical precautions to avoid violations, and upon the voluntary withdrawal of his objection to this testimony, the Trial Court permitted the defendant to testify to his conversation with Mr. Hunley of OPA.

The defendant thereupon testified that, prior to the shipping of this lumber by the Pan American Trading Company, he telephoned to OPA and had a telephone conversation with Mr. Huntley, who, during the conversation consulted with other persons in the office among whom, the defendant thought, was Mr. Burt, and that Mr. Huntley advised him that imported Mexican pine was not subject to price ceilings, and that he received from OPA a copy of Amendment No. 8 to MPR 94 in which, as a part of Press Release, it was stated that imported lumber was not subject to price ceilings.

Mr. Huntley denied that he so advised the defendant. He remembered talking to the defendant sometime after

the suit was started (Tr. 218) and to some one about Mexican pine before that time, but he did not remember talking to the defendant and he never told anyone that Mexican pine was not subject to the regulation.

In the face of the Court's stated impatience and displeasure with all persons who seek advice from OPA, what possible value could this testimony of conversations have had to sustain even the partial defense to more than single damages that Section 205 (e), as amended, permitted?

If, in the Trial Court's mind, a defendant who consults with OPA and seeks advice concerning a contemplated transaction is the worst violator by reason of doing these very things, then certainly the Court could not have given the defendant any of the consideration that this testimony would otherwise entitle him to, and in this connection, we do not believe it made any difference whether or not Mr. Huntley remembered the conversation, or whether he did or did not advise anyone that purchases of imported lumber were subject to price ceilings.

When a copy of Amendment No. 8 to MPR 94 was handed to the Court to be read, the record discloses that the Court refused to consider language appearing in the printed OPA document because it was part of the Press Release and not of the amendment and therefore of no value as evidence (Tr. 127). The Press Release is undoubtedly a part of the document issued by the Office of Price Administration. There is no indication in the document that any part is to be read and understood and relied upon in a manner different from any other part. The defendant is not a lawyer. The circulation of the document is not confined to lawyers by the Office of Price Administration, and for the purpose of establishing if the defendant did or did not wilfully violate the regulations, or did or did not fail to take practical precautions not to violate them, the

manner in which the Court treated this offered evidence is clearly in violation of the defendant's rights and failed to give the defendant the benefit of a defense to which, under the statute as amended, he was clearly entitled.

The language depended upon in this Press Release stated: "There are no price ceilings on the purchase of Mexican pine lumber outside the United States." (Tr. 42) This language seems to be plain and simple and anyone relying upon it to mean what it says should, we believe, be given the benefit of the effect that this document would have on the reasonably intelligent business man. Whether or not Press Releases are binding and whether or not Amendment No. 8 is applicable only to the Defense Materials Corporation, seems to us to be completely beside the point under the circumstances surrounding the defendant's inquiry and the information he testified he received in reply to his inquiry about his proposed handling of imported Mexican pine. The only question the Court should have considered upon the offer of this testimony was: was defendant misled by the unequivocal printed statement in the official document he received in connection with advice he was given by an official of OPA to believe that he could handle this lumber free from the price restrictions of MPR 94. If he was led to believe this, he could not have wilfully violated the regulations, and if he inquired about whether or not he could order the lumber, his inquiry establishes that he took practical precautions not to violate the regulations.

Under the circumstances any damages in excess of single damages is the result of a refusal and failure by the Trial Court to consider and give effect to evidence of good faith and the taking of practical precautions to which the defendant was entitled.

In the face of all the indignation expressed by the Court, and the Court's suspicion that the defendant was a deliber-

ate violator by reason of his having made inquiries of OPA so that this case became "one of the worst cases the Trial Court had before it" (Tr. 230), we request that the Court note that the lumber was handled in carload lots to retail yards for the importer's price plus a modest handling charge. The total of the handling charges for all the cars involved does not exceed $2400.00 on the original 19 cars (Def. Ex. 2, Tr. 189) and not to exceed $3000 on all the cars. This sum was his total gross profit for handling 28 cars of lumber involving a gross value of over $60,000.00. His net profit was this sum less his cost for labor in handling the lumber.

This man is, however characterized by the Trial Court as being the worst violator who ever appeared in OPA cases before him. We venture to state that the present case is unique in that all other "lesser" violators pocketed the overcharge. If this defendant bore a resemblance to other defendants before the Court, he would have been shown to have profited to the extent of approximately $23,000.00 and not to less than $3000.00.

On page 229 of the Transcript the Court characterized this defendant as a black market operator. We believe this was evidence of the Court's prejudiced attitude toward the defendant and we further believe that there is no justification whatsoever in the record for this characterization.

What, consistent with good business and good economic sense, did happen in this case? In 1943 lumber, and particularly pine lumber, was scarce in the United States. (Tr. 101) The retail yards, customers of the defendant, needed pine to fill orders, many of which were directly involved in the war effort, and could find no source of supply for such lumber. This source, from outside the United States, was brought to the defendant's attention and the price asked for the lumber, $63.00 per M board

feet, was above American ceilings for No. 3 Common and Better. The defendant asked OPA if the lumber could be bought at this price and OPA advised him that imported lumber was not subject to price ceilings and that it could be bought at this price. The defendant found support for this conclusion in the language of the Press Release, part of Amendment No. 8 to MPR 94 which was subsequently called to his attention.

He, thereupon, ordered the lumber at $63.00 per M board feet and delivered the lumber to his retail yard customers at exactly the same price in carload lots, plus a modest charge for handling, after a full discussion with each of his customers and at their special request. The retailers, after checking the contents of the cars, requested additional lumber at the price. (Tr. 187) It may be assumed that they could handle the lumber without violating price ceilings to the consumers because the lumber graded out exceptionally well and the ceilings for the various grades in each car of No. 3 Common and Better made it possible for them to sell the lumber profitably and within the ceilings. This assumption finds ample support in the facts that none of the retail yard defendants was sued for damages in this action (Tr. 3, 9) and that by the decree of September 25, 1944 no injunction was entered against them. (Tr. 59, 61)

The defendant's handling of this lumber was not to make an unconscionable profit and did not result in one. It was not to deliver the lumber to anyone except reputable dealers who, in turn, bought the lumber because its quality enabled them to sell profitably but within price ceilings. There is no evidence whatsoever that this was a black market transaction or that the lumber found its way into a black market. The defendant was getting lumber into the American market which was suffering an acute shortage of this commodity and took no advantage of his bargaining position.

We wish to observe, in this connection, that inflation, the prevention of which is the central object of the Emergency Price Control Act of 1942, and the regulations under it, is a two-headed monster. One head represents a scarcity of goods and the other an abundance of money seeking to buy those goods. Its growth is caused by the cross-forces exerted by the abundance and the scarcity on each other. The Court, in the absence of his obvious prejudice against this defendant, could have found, without difficulty, that the purpose and intent of this defendant in handling this lumber was to make available to his customers and to the American economy in general nearly a million feet of Mexican produced lumber which might otherwise have stayed out of our market, and it can be said that its being kept out of our market, thereby aggravating the scarcity to that extent, would have had a more profound inflationary effect on our economy than anything the defendant did in connection with this transaction.

## V.

**The Trial Court erroneously considered improper and wholly inadequate testimony as to overcharges in the sale of nine cars of lumber and improperly entered judgment for $12,924.96 as a part of the total judgment of $45,664.94 without proof to support the first above stated damages.**

Plaintiff's Exhibit 51, is an elaborate chart prepared by the plaintiff, from which he requested that the Court determine the amount of overcharges for 19 cars of pine lumber and 1 car of oak flooring. During the course of the trial, the plaintiff established that the defendant had handled 9 additional cars of pine lumber. In answer to questions, the defendant testified that while he did not check the data with respect to the 9 cars, he supposed

that they were sold exactly the same way as the 19 cars that were covered in the chart Plaintiff's Exhibit 51. (Tr. 194) The plaintiff obtained permission to increase the *ad damnum* of this action by $30,000.00, to cover three times the claimed overcharges in the handling of these 9 cars.

The original 19 cars of pine lumber were sold for $63.00 per thousand board feet, plus freight in carload lots, and for from $78.00 to $80.00 per thousand board feet, including freight, in less than carload lots. (Tr. 46) No proof was offered of the relation of the prices of $63.00, $78.00, and $80.00, respectively, to the prices established in MPR 94, prices which considered the many factors of grades, lengths, widths and weights, nor was any evidence offered of the number of feet of lumber contained in these cars, or whether or not any or all of the cars were sold in carload lots or less than carload lots.

The attorney for the plaintiff, in his argument to the court, said that he had established that the prices for the 9 cars were computed the same way as the original 19 cars and by applying the same "proportion" he found the single overcharge on the additional 9 cars to be $6462.48. (Tr. 220) On the basis of this "proof", the Court included in his finding a judgment in the sum of $12,924.96 as a part of the total judgment of $45,664.94.

It is impossible to ascertain the amount of overcharges by merely using the ratio of 9 cars to 19 cars and determining overcharges for the 9 cars by dividing the ascertained overcharges for 19 cars by 19 and then multiplying the result by 9, since no proof was offered of the amount of lumber, the grade or grades, lengths, widths, weights or freight charges of the lumber contained in these cars or which cars were sold in carload lots and which were sold in less than carload lots. There is no rule that permits the application of "the same proportion" for the purpose of arriving at damages amount-

ing to $12,924.96. The same proportion is no more than the conclusion of the attorney for the plaintiff. It does not reflect that all or any of the factors that needed to have been taken into consideration to arrive at the overcharges were, in fact, given consideration for this purpose. On the contrary, none of these factors was considered.

The plaintiff considered it necessary to present and presented an analysis in great detail of as many factors as he thought applicable to the transactions of the defendant with the retail yards for the purpose of qualifying, as proof, the conclusion of his analysis; which was that certain amounts shown were overcharges in the selling of the 19 cars of lumber. (Pltf's Ex. 51, Tr. 20-25) The Exhibits, for the purpose of qualifying them as evidence of overcharges show the names of the various purchasers of the lumber, the board feet of lumber sold to each of these purchasers, the estimated freight charges for each sale, the maximum prices under MPR 94 and 458 for each sale, and the amount of plaintiff's estimated overcharges for each sale. Some of the cars are shown to have been sold in less than carload lots. In these cases different prices and the different manner of establishing the freight charges are used in the exhibits. The resulting overcharges for these sales of less than carload lots reflect different factors.

In presenting his proof of overcharges involved in the 9 additional cars the plaintiff in using his "proportion" method gave no consideration to any possible differences that existed in the original transactions involved in the 19 cars nor does it appear anywhere that he gave any consideration to whether or not the additional 9 cars were full cars or broken lots out of a car or cars. The result of plaintiff's proportion method, which did not give consideration to these possible differences, is necessarily an inaccurate result and were the proof admissible otherwise the doubt and inaccuracy by reason of the failure to give

consideration to all factors involved would make this proof improper as a basis for overcharges and damages.

Proof of overcharges and damages should not be subject to doubt and varied construction. It should be exact and detailed. Plaintiff showed his understanding of this requirement by proof of damages offered with reference to the 19 cars. His rudimentary and wholly inadequate proof of overcharges and damages as to the 9 additional cars, it seems to us, makes it necessary for this Court to reduce the judgment by $12,924.96.

## VI.

**The evidence and exhibits of Charles L. Baxter received over the objection of the defendant were improperly received and were prejudicial.**

The Court allowed Mr. Charles L. Baxter to testify for the plaintiff that he was a lumber dealer and had been offered Mexican Ponderosa Pine by the Pan American Trading Company at $55.00 per M board feet and that he corresponded with OPA about this offer and was advised that the purchase would violate the price ceilings imposed by Maximum Price Regulation 94. Mr. Baxter thereupon refused to handle the lumber. The defendant moved to strike this testimony (Tr. 138) and objected to the admission in evidence of the letters between Mr. Baxter and OPA. The motion to strike was denied and the exhibits were received for the purpose, as stated by the Court, of showing what the defendant should have known with his experience as a business man. (Tr. 149)

There is no dispute that the offer to sell Mr. Baxter the lumber by the Pan American Trading Company at $55.00 per M board feet and the correspondence between OPA and the witness were unknown to the defendant prior to

the giving of the testimony on the trial, and that the defendant was in no way connected with Baxter in the transaction involving this offer to sell lumber to Baxter.

It seems impossible to reconcile the consideration of this evidence by the Court with the Court's stated purpose for considering the evidence, viz., that it established what the defendant should have known with his experience in business, with the unqualified fact that the defendant's knowledge cannot be predicated on Mr. Baxter's exclusive experience.

Again we wonder if the Court would have accepted the testimony that other persons purchased the lumber for more than $63.00 per M board feet (the other defendants in this case) as establishing that the defendant was without fault in buying the lumber and that he did only what numerous other lumber people were doing. These other defendants were permitted by the Court, in its decree, to state that whatever was done by them in connection with the purchase and handling of this lumber was not done wilfully. (Tr. 60) The Court would have properly rejected such testimony. Yet the Court allowed the opposite of this to be proved by the Baxter testimony and letters.

The finding and decision reflect that the Court, knowing how Mr. Baxter acted, held that the defendant was therefore a wilful violator. This is a glaring *non-sequitor* and a judgment which reflects this erroneous reasoning cannot give proper consideration to the question of lack of wilfulness and the taking of practical precautions to avoid violations, to which consideration the defendant is clearly entitled and which the record shows he was not given.

The reason for the impropriety of receiving and considering this evidence for any purpose is stated in *Corpus Juris* (Secundum) Vol. 32, Sec. 576, page 432 as follows:

> "Under the general rule known as '*res inter alios acta*' a litigant cannot be affected by the words or acts

of others with whom he is in no way connected and for whose words or acts he is not legally responsible."

The rule is further stated and illustrated in the case of *General Motors Corporation* v. *Blackmore*, 53 Fed. (2d) 725, 729 as follows:

"The defendant contends that the Court below erred in admitting evidence of various settlements made with other infringers and of recoveries had in other infringement actions as proof tending to show what was a reasonable royalty. The settlements might possibly have been offered by the defendant as some evidence in the nature of admissions by plaintiffs upon the subject of reasonable royalty to be given only such weight as might seem reasonable in view of surrounding circumstances; but neither they, nor the recoveries in other actions were properly received in evidence in support of plaintiff's case. Both lacked the element of volition upon the part of the infringers which was necessary to show true or actual value by showing what others were generally willing to pay and the licensors willing to accept."

We finally wish to quote from *Wigmore on Evidence*, Volume 2, 3rd edition, Sec. 377, page 310 in support of our position, as follows:

"2b. *Contracts evidenced by other contracts with other persons.* Here, obviously, though the principal remains the same, the other instances must be more marked in their similarity in order to be admissible to evidence as a general plan or habit because the elements to a different personality is often so important in effecting the making of the terms of a contract that the likelihood of making a similar contract with different persons is relatively much smaller. It thus happens that the Courts are generally inclined to exclude such evidence."

## VII.

**The Court's refusal to allow defendant and his witnesses to testify to the defendant's distribution yard facilities and to the defendant's knowledge of the grades and qualities of the lumber was improper.**

Maximum Price Regulations 94 and 458 establish prices for lumber sold in carload lots designated by the regulations as mill transactions, and certain other and higher prices for lumber sold in less than carload lots out of distribution yards (Sec. 3 MPR 94). The regulations provide that lumber to be sold at the higher prices must be first made an integral part of the stock of a distribution yard and if sold from the stock will be considered a distribution yard transaction and may be sold for the higher prices.

In submitting its schedules of prices permitted by the regulations for the lumber involved in this action, plaintiff gave no consideration whatsoever to the higher prices permitted by the regulations for distribution yard transactions, treating all of the transactions, whether full carloads or partial loads as mill transactions. The exhibit, #51 of plaintiff however, indicates that a portion of the Mexican pine and all of the flooring were sold in truckload lots. None of this lumber was made a part of any of defendant's distribution yard stocks. The testimony that the defendant had facilities for storing lumber and an offer of proof of these facts were rejected by the Court on plaintiff's objection. (Tr. 173)

A strict application of the regulations to a defendant whom the Court considered guilty of wilful violations, is undoubtedly what the refusal of the Court to consider this testimony indicates. It further indicates that the Court felt that no testimony offered by the defendant or any of his witnesses, short of a compliance with the exact letter of the regulations, was permissible and would be considered by the Court. This is, however, the ap-

plication of a rule of law in an economic and business vacuum. It is an application that refused to consider difficult conditions of shortages, and pressures, and needs for scarce material that may require, and in this case the evidence would have shown that it did require speedy handling of the lumber to avoid the entangling conditions imposed by a regulation designed for a normal state of supply and demand. The condition of supply and demand was far from normal and the method of furnishing the goods under these conditions could not have conformed to the slow tempo of a regulation perhaps unwittingly, designed for plenty. It was a time of great scarcity.

It was impossible to carry out a regulation that required the unloading of lumber from the cars into lumber piles contained in a distribution yard, and from these piles to re-load them upon trucks before they could be distributed to the consumers who were clamoring for lumber to build and repair all manner of necessary structures. Unless this is done, the regulation states, the seller cannot charge the higher price allowed for distribution yard sales. It does not matter that but for the wasteful and time consuming formula of the regulation—they are distribution yard sales and can be nothing else. The seller must follow the strict and elaborate ritual of the regulation in handling of the lumber or he becomes a wilful violator and he must be punished by being charged with double the over-charges between the mill price and the price he received without regard to the fact that, except for the letter of the regulations, it was unquestionably not a mill transaction.

The Court, in refusing to hear this testimony, refused to face any facts that may have absolved the defendant from the severe penalties of the regulations. He refused to allow the defendant or his witnesses to state any of these facts. He refused to consider business practices quite fair, quite honorable, and quite old, as they

might have affected the Court's conclusion that the defendant acted wilfully as opposed to a finding that the defendant's actions with respect to these transactions were dictated by extraordinary and necessitous considerations.

We urge that the Court committed error when it refused to allow the defendant and his witnesses to testify that the defendant had distribution yard facilities. (Tr. 156, 157, 173, 175) The presence of these facilities was relevant to the question of whether the defendant was a wilful violator or whether the need for immediate distribution of the lumber prevented a compliance with the letter of the regulations.

The defendant made numerous offers of proof of the actual grades of the Mexican pine found in the cars involved in the action and all such offers were refused by the Court as something the defendant would not be permitted to "get away with". The testimony of certain of the retail yard owners, all of whom were defendants in the suit below and who bought, examined, and sold the lumber to the public and whose claim that they had not wilfully or intentionally violated the regulations in the handling of these transactions was a part of a decree entered against them in this case (Tr. 60), and who knew the contents of the cars, was not permitted by the Court on the objections of the plaintiff. (Tr. 153, 155, 162, 167, 173, 182, 197, 210) This testimony and testimony of the defendant that he knew that the cars graded high, which was also ruled out on objection (Tr. 187) was improperly refused by the Trial Court. It was relevant to lack of wilfulness for the reason that testimony that the lumber was poor in grade and known to be so by the defendant (if such testimony existed) would have been relevant to prove a wilful violation. The actual quality of the lumber and the defendant's knowledge that

that quality was sufficiently high to enable the retail yards to sell the lumber within ceilings, was testimony that should have been considered by the Court. It was applicable to the question of whether or not the defendant, Lentin, was guilty of anything more than a formal, technical or paper violation of the regulations, and, at the very least, the defendant's lack of wilfulness to commit a violation of the regulations. In this case, as the judgment now stands, the failure to receive this testimony involves the question of whether or not the judgment for $45,665.94 was properly entered and, at the very least, whether the Court could enter a judgment for more than one-half this amount.

We contend that the Court erred in refusing to hear this testimony. That in the absence of having heard this testimony, its judgment was erroneous.

## VIII.

**Defendant was improperly denied credit for specified 16, 18, and 20 foot lengths, 4 and 6 inch widths, as provided in Maximum Price Regulation 94.**

The provisions of revised Maximum Price Regulation 94 contain the following as applied to Common Boards (Ponderosa Pine):

> "Lengths:
>
> 6. Specified lengths No. 1, 2 and 3 Common, 4 inch and 6 inch—16 feet, 18 feet, and 20 feet, add $2.00."

The record shows that the defendant did not receive credit of $2.00 per thousand board feet by reason of 16, 18 and 20 foot lengths specified in all the orders for lumber listed in plaintiff's exhibit 51, which exhibit was presented and received by the Court to establish the over-

charges in 19 cars of lumber, nor was the defendant given credit for 16, 18 and 20 foot lengths in the "proportional" method used by the plaintiff in presenting the over-charges for the 9 additional cars.

Plaintiff's exhibits 4, 5b, 5c, 5d, 5e, 5f, 5g, 6, 6a, 7, 7a, 8c, 8d, 9, 9a, 10, 11, 11a, 12, 12a, 13a, 13b, 14, 14a, 15d, 15e, 16, 16a, 17, 17a, 18, 18a, 19, 20, 21, 22 and 23a, are all copies of invoices from Pan American Trading Company to J. Lentin Lumber Company, the defendant, from Pan American Trading Company to several retail yards which purchased the lumber, and from the defendant to these retail customers. In all the invoices 16, 18 and 20 foot lengths are specified and all the cars contained specified 4 inch widths. The Court refused to consider the allowance of the credit of $2.00 per thousand board feet for the specified lengths after a lengthy and complicated inquiry into whether the defendant was entitled to the allowance under the regulation; what "specified lengths" meant, if the lumber was classified as restricted random lengths, 10 to 16 feet, 4/4 thickness only, for which $1.00 per M board feet was to be added and not $2.00. The Court held that because the orders (Plaintiff's Exhibit 4 and Plaintiff's Exhibit 30) specified "cars to contain approximately 30,000 feet each, 1x6 to 1x12 and 2x6 to 2x12, 10 to 20, No. 3 and better grade, Mexican Pine S-4-S widths and lengths to be well assorted, each car to contain approximately 30,000 feet each ½ to be 1 inch, and ½ to be 2 inch", that the invoicing of the cars showing 4 inch widths and 16, 18 and 20 foot lengths in all the invoices in evidence as plaintiff's exhibits was not to be considered for the purpose of allowing the defendant $2.00 per M board feet for the lumber in each shipment that was so specified to be 4 inches wide and 16, 18 and 20 feet long. On the basis of these specifications the defendant contends that he should have been given additional credit of $2.00 per M board feet on the entire

shipment in arrriving at the amount of his alleged overcharges and that the Court erroneously refused to give him this credit. (Tr. 117 to 126)

The Court, after this discussion, threw the whole question out and nothing was allowed the defendant for these widths and lengths. It amounts to about $2000.00 single damages and to about $4000.00 of the judgment entered.

We refer the Court to the above specified exhibits. By order of this Court the exhibits were not to be printed but could be referred to in the briefs. (Tr. 274) Lengths are specified in detail. We contend the regulation means that the defendant may charge $2.00 more for a thousand board feet when 16, 18 and 20 foot lengths are specified and the lumber is 4 and 6 inches wide. These conditions were clearly met in the invoices, copies of which are in evidence as exhibits.

Plaintiff's Exhibits 4 and 30 are purchase orders for 3 and 25 cars of lumber respectively. They specify widths of 6 to 12 inches and lengths of 10 to 20 feet. Plaintiff's Exhibit 5-A is an invoice from Pan-American Trading Company to Siegel Lumber Company, one of the other defendants in the case. It specifies 10 to 20 feet lengths. All of the other exhibits which are invoices from the defendant to various retail yard purchasers and from Pan-American Trading Company to the defendant, specify 8, 10, 12, 14, 16, 18 and 20 feet lengths.

We contend, therefore, that the defendant was erroneously denied a credit of about $2000.00 and about $4000 damages was improperly entered against him on account of the failure to credit this item to him.

## IX.

**The permanent injunction entered against this defendant was improperly entered in the absence of proof of the likelihood that the offense will recur.**

As part of its judgment order the Court, at the request of the plaintiff, enjoined the defendant, Julian Lentin, his agents, servants, employees and attorneys permanently "from selling, purchasing, and otherwise dealing in lumber at prices in excess of the maximum prices established therefor by Maximum Price Regulation No. 94 as now or hereafter amended, Maximum Price Regulation No. 458 as now or hereafter amended, or any maximum price regulation now or which may hereafter be issued pursuant to the Emergency Price Control Act of 1942 as amended and extended, establishing maximum prices for lumber and from failing to keep records required by any of said regulations as now or hereafter amended in the manner and form required by said regulations and from otherwise violating the terms and provisions of any of said regulations as now or hereafter amended." (Tr. 254)

The record is completely devoid of any evidence to sustain the likelihood that there would be any future violations of price regulations by the defendant. The entire proof in this case was limited to violations that the defendant had been charged with having committed in the past.

Since the case of *The Hecht Co.* v. *Bowles, etc.*, 321 U. S. 321 courts of equity have discretion to act in each case as the equities of that case require. The rule that upon the showing of a violation it was mandatory upon the trial court to enter injunctions was held by *The Hecht Co.* v. *Bowles* case not to be the law.

The rule is equally well-settled that in order to support a permanent injunction against future violations there must be evidence in the record that establishes that such future violations are likely to occur. In *Shore* v. *United States,* 282 Fed. 857 this Court stated:

> "Where injunctional relief is sought because of repeated and continuous breaches of duty or violations of the law, the evidence must show that such violations, if not prevented, will occur in the future. Relief by injunction looks to the future. Its purpose is to prevent future injury or to regulate the future conduct of a party. If transgressions have ceased before the bill is filed and before the proceedings are instituted, and if it appears that they will not be repeated, injunctional relief will not be granted. The aggrieved party will be left to his action at law. Hence, in the present instance, if the parties who maintained their premises as a nuisance in violation of the National Prohibition Act abated the nuisance and ceased violating the law, prior to the institution of any suit, injunctional relief should be denied."

In *Walling* v. *T. Buettner & Co.,* 133 Fed. (2d) 306 this Court stated, at page 308:

> "A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued before the suit for injunction was brought, and where there is no evidence that the offense is likely to be repeated in the future. Courts of equity are not to be used to punish past offenses, but only in a proper case to prevent wrongdoing in the future. * * * The remedy is never afforded on suspicion or on the ungrounded fear that the offense may be repeated in the future. * * * Employers who are acting in good faith and endeavoring to comply with the law should not be harassed by the processes of a court of equity coercing them to do what they are willing to do and are trying to do voluntarily. Equity will promptly respond to meet a violation or a threatened violation, and it will as emphatically refuse its aid where none is made to appear."

It may be assumed from the nature of the defendant's business that both prior to and since the filing of the present action against him, he handled, both as buyer, seller and broker, a large quantity of lumber of various kinds. The present action concerns itself with two transactions involving a purchase or purchases from two sellers out of a great number of transactions which this defendant has handled. The oak flooring represents a minor phase of the action. Representatives of the Office of Price Administration had examined invoices in bound volumes that were freely given to them by defendant for this purpose, and if O.P.A. investigators had found any evidence to back charges that this defendant had been a violator of regulations in any other except the case of the Mexican Ponderosa Pine purchased from the Pan American Trading Co., and the oak flooring, we can be sure that proof of these violations would have been made the basis of actions against this defendant, and testimony of such course of conduct would have been heard upon the trial of this case.

In any event there was no evidence offered by the plaintiff from which it could be implied that any other violations had occurred in the past or were likely to occur in the future through any act of this defendant.

The permanent injunction entered in this case has no basis in the record because of this failure to establish the likelihood of any future violations of price regulations. The injunction also prohibits the defendant from failing to keep records required by any regulations. Our objection to this part of the injunctional order is that, not only was there no evidence that a failure to keep records by this defendant was likely to occur in the future, but there was no evidence whatsoever that he had ever failed to keep records as required by any regulations in the past.

We believe that the injunction entered was not supported by any evidence in the record and that it is therefore an erroneous order.

## CONCLUSION.

When a defendant, under the circumstances of this case, is shown to have handled nearly a million feet of lumber for an undisputed and actual profit to him of less than $3000.00, from which must also be deducted his labor costs and his taxes, and he is assessed damages amounting to $45,632.15 for handling this transaction, the record should be free from errors of prejudice and failure to hear and consider evidence which tend to establish partial and complete defenses to the action. The present record, we respectfully urge, is infected with such error and should be reversed.

Respectfully submitted,

HENRY H. KOVEN,
*Attorney for Appellant.*

LOUIS E. LEVINSON,
*Of Counsel.*

**United States Circuit Court of Appeals**

**For the Seventh Circuit**

I, KENNETH J. CARRICK, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ~~printed~~ pages contain a true copy of **Appellant's brief filed in this office on the thirtieth day of June, 1945, in:**

Cause No. ~~6766~~

**CHESTER A. BOWLES, Administrator, Office of Price Administration,**
vs. **Plaintiff-Appellee,**

**JULIAN LENTIN doing business as J. LENTIN LUMBER COMPANY,**
**Defendant-Appellant,**

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this **fifteenth** day of **January** A. D. 19**46**.

Kenneth J. Carrick
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

By: R. Hays Blanchard
Chief Deputy Clerk

15

FILED

FEB 26 1946

CHARLES ELMORE CROPLEY
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

## No. 805

JULIAN LENTIN, DOING BUSINESS AS J. LENTIN LUMBER COMPANY,
*Petitioner (Appellant-Defendant below),*

*vs.*

PAUL A. PORTER, SUBSTITUTED AS ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION FOR AND ON BEHALF OF THE UNITED STATES,
*Respondent (Appellee-Plaintiff below).*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## MOTION TO SET ASIDE ORDER DENYING CERTIORARI AND FOR A RECONSIDERATION OF THE PETITION AND SUGGESTIONS IN SUPPORT THEREOF.

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IN THE

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*Respondent (Appellee-Plaintiff below).*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## MOTION TO SET ASIDE ORDER DENYING CERTIORARI AND FOR A RECONSIDERATION OF THE PETITION.

Now comes petitioner, Julian Lentin, doing business as J. Lentin Lumber Company, and moves to set aside and vacate the order of April 22, 1946, denying the petition for

certiorari herein and for a reconsideration of said petition for the reasons set forth in the suggestions accompanying this motion.

*Counsel for Petitioner,*
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1 North La Salle St.,
Chicago 2, Illinois.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1945

**No. 805**

JULIAN LENTIN, DOING BUSINESS AS J. LENTIN LUMBER COMPANY,
*Petitioner (Appellant-Defendant below),*

*vs.*

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*Respondent (Appellee-Plaintiff below),*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## SUGGESTIONS IN SUPPORT OF MOTION.

It is not disputed that petitioner's gross profit was less than $3,000, for which judgment for $46,665.94 was entered against him (R. 252, 189). Nowhere in the reply of the respondent filed March 12, 1946, several weeks later than provided for in the rules of this Honorable Court, was

there even an attempt to reply to this cruel and astounding penalization by way of assessment of damages not provided for in the Emergency Price Control Act nor contemplated by any known rules relating to the admeasurement of damages in Anglo-Saxon jurisprudence.

The trial judge, evidencing his bias against the class of cases to which this case belongs, himself said (R. 189):

> "The Court: Well, all the force and effect I can see that has that this defendant in order to make $2,400 on the outside, he allowed the people to be mulcted of $16,000."

The Eighth Amendment of the Constitution of the United States forbids cruel punishment. While the decided cases under that amendment involve criminal law the limitation upon Congress in the matter of cruel punitive legislation, suggests the parallel guaranty against double jeopardy contained in the Fifth Amendment.

Concerning "double jeopardy," Mr. Justice Holmes in *United States* v. *Oppenheimer,* 242 U. S. 85 (affirming on writ of error a judgment quashing an indictment because of a previous adjudication upon a former indictment for the same offense that it was barred by the Statute of Limitations), after reviewing the historical common law background, at page 164, says:

> " '*In this respect the criminal law is in unison with that which prevails in civil proceedings.*' Hawkins, *J.,* in *Reg.* v. *Miles,* L. R. Q. B. Div. 423, 431. The finality of a previous adjudication as to the matters determined by it, is the ground of decision in *Com.* v. *Evans,* 101 Mass. 25, *the criminal law and the civil law agreeing,* as Mr. Justice Hawkins says. *Com.* v. *Ellis,* 160 Mass. 165, 35 N. E. 773; *Brittain* v. *Kinnaird,* 1 Brod. & B. 432, 129 Eng. Reprint, 789, 4 J. B. Moore, 50, Gow. N. P. 164, 21 Revised Statutes 680. *Seemingly the same view was taken in Frank* v. *Mangum,* 237 U. S. 309, 334, *as it was also in Coffey* v. *United States,* 116 U. S. 436, 445."

The same is true of administrative proceedings. Referring to authorized administrative proceeding the Circuit Court of Appeals for the Second Circuit in *McMann* v. *Securities and Exchange Commission,* 87 Fed. (2d) 377 (cert. den. 301 U. S. 684) says (379):

> "* * * but if it be duly authorized it is no more subject to obstruction than judicial proceedings."

See, also, *Perkins* v. *Endicott Johnson Corporation,* 128 Fed. (2d) 208, 214, per Circuit Judge Frank affirmed *sub nom. Endicott Johnson Corporation* v. *Perkins,* 317 U. S. 501. Please see majority opinion by Mr. Justice Jackson.

In *Dennison* v. *Payne,* 293 Fed. 333 (C. C. A. 2), action at law to recover damages for plaintiff's intestate arising out of federal control of Delaware, Lackawanna & Western Railroad Co., at 341:

> "It is also undoubted law that the rule which forbids the re-opening a matter once judicially determined by competent authority applies as well to the judicial and quasi judicial acts of public officers and boards as well as to judgments of courts having general judicial powers."

See also:

*United States* v. *Kearns,* 115 Fed. (2d) 555 (C. C. A. 10).

*Modern Woodmen of America* v. *Casados,* 17 Fed. Supp. 763, 766.

Applying the fundamental constitutional safeguard of the Eighth Amendment, it seems inconceivable that this Honorable Court upon a reconsideration of the petition herein will suffer the judgment for $46,665.94 to stand in the light of the uncontradicted showing that less than $3,000 was the sole net income to petitioner upon the alleged infraction of the regulation.